Supreme Court, U.S.
FILED
MAR 21 2007
OFFICE OF THE CLERK

No. 06-926

In the Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION, and
GM DAEWOO AUTO & TECHNOLOGY CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As explained in the petition, and confirmed in the *amicus* brief of CMA Business Credit Services, this case raises significant and recurring issues of federal law on which the circuits are sharply divided. May the judge-made doctrine of international comity be used to close the doors of an American courthouse to claims that could not have been brought in the foreign proceeding (and have not been adjudicated *anywhere*)? May a foreign reorganization court's judgment be invoked by a non-debtor "as a shield" against claims asserted by another non-debtor based on conduct extrinsic to the bankruptcy proceeding, in direct conflict with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260 (1987)? And should these extraordinary expansions of the international comity doctrine be reviewed by appellate courts only for abuse of discretion, in conflict with the Second Circuit's decision in *Diorinou* v. *Mezitis*, 237 F.3d 133 (2001), even though many circuits – including the Eleventh Circuit itself – apply *de novo* review to res judicata rulings that involve prior *domestic* judgments?

Respondents' submissions sidestep these questions, principally by repackaging the court of appeals' rationale into a more defensible formulation. None of these efforts pays off, however, and further review of this extraordinary expansion of international comity is plainly warranted.

I. The Court Should Resolve The Conflict Over The Proper Standard Of Appellate Review

As we demonstrated in the petition (at 6-7, 13, 15-22), the panel majority applied the deferential abuse-of-discretion standard to the district court's blanket application of comity and dismissal of petitioner's claims. In so doing, the Eleventh Circuit parted company with the Second Circuit's well-reasoned decision in *Diorinou*, which had adopted and applied *de novo* review for comity rulings of the kind involved here. The Eleventh Circuit's holding improperly elevates the status of a

foreign judgment *above* that of a domestic judgment (because the latter's res judicata effect is reviewed *de novo* in the Eleventh and other circuits). It therefore violates the fundamental principle of parity. In adopting this standard of review, the panel offered no reason – other than a mistaken analogy to abstention cases – for affording such deference to the district court's application of claim-preclusive comity to a foreign judgment.

Respondents claim there is no conflict with *Diorinou* because the Second Circuit's opinion is "equivocal about the proper standard of review" and reaches only "tentative conclusion[s]." Suzuki Opp. 2, 15; accord GM Opp. 13 n.5. But Judge Newman's opinion could hardly be clearer. See Pet. 15-17. After exhaustively reviewing the relevant case law and identifying the "three different contexts" in which "United States courts have said that they are deferring to foreign proceedings or adjudications as a matter of 'comity'" (237 F.3d at 139), Judge Newman had this to say about the proper approach of appellate courts in reviewing (as in this case) the decision of "a domestic court * * * whether to accept the adjudication of a foreign tribunal on a cause of action or a particular issue" (*ibid.*):

> [W]e believe the standard is *de novo* review, * * * just as it would be on review of a judgment of a domestic court based on *res judicata* or collateral estoppel.

Id. at 140. Contrary to the suggestion of the Suzuki respondents, it is not possible to read equivocation or tentativeness into the simple declaratory statement, "we believe." See also *ibid.* (explaining that, "[i]n making that *de novo* review," the panel would examine the "further issue * * * as to the nature of the deference the trial court (and the appellate court in its *de novo* review) should accord to the foreign adjudication").

Equally baseless is respondents' suggestion that *Diorinou*'s holding was either dicta or has been ignored by later Second Circuit decisions. GM Opp. 12-13 & n.5 (largely, however, discussing pre-*Diorinou* cases); Suzuki Opp. 2, 13-14 & n.9, 16-17 (same). The Second Circuit's opinion clearly identifies "the

deference that a United States court * * * should accord to a judgment of another country" as the "principal issue" raised in the appeal – and resolves that issue after unambiguously both determining that *de novo* review is appropriate and applying that standard of review. After *Diorinou*, no district judge in the Second Circuit could possibly think that his or her comity rulings relating to the res judicata effect of a foreign judgment would be reviewed deferentially on appeal.

Nor are respondents correct in contending that "more recent * * * Second Circuit opinions" have disregarded *Diorinou*'s holding or applied an abuse-of-discretion standard of review in cases such as this. Suzuki Opp. 2; see also *id.* at 13-14, 17; GM Opp. 13. The only post-*Diorinou* decision cited by respondents for that proposition plainly involved an abstention-type use of the comity doctrine. See *JP Morgan Chase Bank* v. *Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 420, 422-23 (2d Cir. 2005) (reviewing comity-based decision to abstain in light of ongoing foreign proceeding); accord *Finanz AG Zurich* v. *Banco Economico S.A.*, 192 F.3d 240, 242, 246 (2d Cir. 1999) (identified in *Diorinou* as falling into the first category of abstention-type cases, see 237 F.3d at 139). If anything, the Second Circuit's recent cases involving abstention-type uses of comity have adopted a "more rigorous" standard than ordinary abuse-of-discretion review. See Pet. 17 n.5.[1]

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[1] In a further effort to muddy the waters, the Suzuki respondents suggest (at 12) that the Eleventh Circuit partially applied a *de novo* standard of review, pointing to the panel's statement that "[t]he interpretation of a contract is a question of law that the court reviews *de novo*." Pet. App. 10a. Accord GM Opp. 17. But the panel interpreted the Distribution Agreement in resolving the threshold question whether the Korean court's approval of the Modified Reorganization Plan had violated the automatic stay provision (Pet. App. 11a-13a), not in subsequently resolving the comity issue under the abuse-of-discretion standard (see *id.* at 16a-18a).

Unable to explain away the holding in *Diorinou*, respondents next argue that the decision below is *consistent* with *Diorinou* because this case falls into the first rather than the third category recognized by Judge Newman. GM Opp. 1, 13-14; Suzuki Opp. 2. According to the GM respondents, this is really an "abstention" case because the lower courts' comity rulings were predicated on the possibility that petitioner might pursue its claims in a Korean court *other than* the reorganization court. As explained above, this is pure revisionism. The district court dismissed petitioner's claims because it believed petitioner was seeking "to collaterally attack the entire Korean reorganization process and result." Pet. App. 70a; see also *id.* at 71a (granting "comity" to the Korean bankruptcy court's "proceedings and orders"); *id.* at 63a (making clear that it was "[a]nalyzing whether comity applies to a foreign *judgment*") (emphasis added). The court of appeals upheld the comity ruling on the same ground. *Id.* at 16a (stating that petitioner's claims are "a collateral attack on the order of the Korean court"); *ibid.* (stating that petitioner "cannot now collaterally attack" the reorganization court's "order"). Neither lower court faulted petitioner for failing to initiate a second litigation in Korea; they faulted petitioner for not bringing its claims in the Korean reorganization proceeding that had ended in a final judgment. And the fact that the district court dismissed petitioner's claims "with prejudice" and "entered judgment" (GM Opp. 6) confirms that the basis for the ruling was hardly abstention.

Next, respondents suggest that this case is a poor vehicle for resolving the circuit conflict because "there is no indication that *de novo* review would have led to a different result." Suzuki Opp.17; accord GM Opp. 16. But the court of appeals knew full well how to reserve rather than decide the standard-of-review issue, and it presumably would have done so if the resolution of that threshold issue could properly be avoided and was unnecessary to the outcome of the appeal. The best indication that the issue *did* matter to the outcome, of course, is the fact that it was addressed and resolved by the panel majority. Beyond that, as

Judge Tjoflat noted, it is difficult to see how the panel's cursory analysis could reflect anything other than a highly deferential abuse-of-discretion standard. Pet. App. 20a (noting that majority "expends little effort" in "analyzing the claims presented in the Amended Complaint"); *id.* at 47a ("it is patently clear" that the majority "rushed into * * * dismissing [petitioner's] Amended Complaint in its entirety"). Conversely, it is difficult to see how the district court's decision to accord res judicata effect to the Korean bankruptcy court's order could be upheld on *de novo* review given the uncontradicted expert testimony that petitioner's claims were outside that court's jurisdiction. See also *id.* at 19a-20a. As for respondents' speculation (Suzuki Opp. 18) that, following a reversal by this Court, the majority would join Judge Tjoflat's alternative rationale, we have already anticipated and addressed that issue. Pet. 10 n.4.[2]

Respondents make no serious effort to deny that the split between the Second and Eleventh Circuit is exacerbated by other circuits that have ruled that the standard of review turns on either the procedural setting of the lower court's ruling, the legal basis for the comity ruling, or both of those factors. See Pet. 19-20; see also CMA *Amicus* Br. 12-20 (explaining Eleventh Circuit's divergence from other circuits in standards applied to review of abstention decisions).[3] And respondents do not dispute that the Eleventh Circuit's use of an abuse-of-discretion

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[2] Respondents suggest (Suzuki Opp. 12 n.8) that petitioner did not clearly argue for a *de novo* standard of review below. Once again, they are mistaken. See Pet. C.A. Opening Br. 20-22 (urging *de novo* review and citing *Diorinou*); Pet. C.A. Reply Br. 1 n.1 ("As explained in our opening brief (at 20-22), the district court's order is reviewable *de novo*."); Reh'g Pet. 1, 9-11 (same).

[3] The Suzuki respondents do claim (at 15 n.10) that a Texas appellate court that expressly adopted the holding of *Diorinou* did so "with reservations." Not so. See *Velez* v. *Mitsak*, 89 S.W.3d 73, 79 (Tex. App. 2002) ("[W]e apply a *de novo* standard.").

standard marks a departure from the approach applied to res judicata rulings, and thus violates the fundamental principle of parity of treatment in the treatment of foreign and domestic judgments – a principle that (as the panel majority acknowledged) is embodied in the Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea. See Pet. 18; Pet. App. 15a. Although respondents deny that the standard-of-review issue is important and recurring, the many cases cited in their briefs serve only to confirm these characteristics. Further review and clarification of the standard-of-review issue is plainly needed.

II. Review Is Also Warranted To Resolve The Conflict Over The Scope Of The Comity Doctrine

As explained in the petition (at 22-30), the second question presented offers this Court a valuable opportunity to examine the Eleventh Circuit's unwarranted expansion of the comity doctrine as well as to bring greater uniformity to this important area of federal law. Specifically, the Court should address whether comity requires that an order approving a plan of reorganization for a foreign debtor in a foreign bankruptcy proceeding be given res judicata effect to bar the damages and other claims of a creditor (1) against parties *other* than the foreign debtor, where (2) such claims were not adjudicated – and could not even have been *raised* – in the foreign bankruptcy proceeding. In upholding this twofold expansion of the comity doctrine, the panel majority, with one judge disagreeing on this ground, extended comity far beyond its traditional boundaries, thereby creating a conflict with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260 (1987), and with this Court's decision in *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

Respondents offer three principal arguments against review of this second issue. First, they say that there is no conflict with *Remington Rand* or *Marrese*. GM Opp. 1-2, 21-26; Suzuki Opp. 21-23, 27. According to respondents, the relevant portion of the

Third Circuit's opinion in *Remington Rand* – Section IV.C, see 830 F.2d at 1267 – was limited or qualified in significant ways by the court's "separate discussion" of other issues in previous sections of the opinion. GM Opp. 22. But the relevant passage in *Remington Rand* contains no trace of such limitation:

> BSI argues that the bankruptcy and district courts improperly entertained Remington U.S.'s claim, because Remington B.V.'s Dutch bankruptcy proceedings were entitled to comity. *This contention is without merit.* Remington U.S.'s claim was against BSI, not Remington B.V. The rationale for granting comity in such a situation would be to allow a foreign debtor's assets to be distributed equitably. *See Cunard S.S. Co. v. Salen Reefer Svcs.*, 773 F.2d 452, 457-58 (2d Cir.1985). Remington B.V.'s bankruptcy, however, *cannot be used as a shield by BSI.*

830 F.2d at 1267 (emphasis added). Of course, if the Third Circuit's decision had really turned on the facts that "the complained-of transaction * * * was not approved by the foreign court" and Remington U.S. "had no notice or opportunity to object" (GM Opp. 22), there would have been no reason for the Third Circuit to include Section IV.C. in its opinion; the court could have (and would) have stopped after Section IV.B. But the Third Circuit did not stop there for a good reason: it wished to address (and reject) all of the "several ways" that BSI was "invok[ing] the concept of international comity," 830 F.2d at 1266, including not only the specific attacks on "the Dutch court's order" (*ibid.*) but also BSI's independent argument based on the special nature of (and need to accord comity towards) the entire "Dutch bankruptcy proceedings." *Id.* at 1267. See also CMA *Amicus* Br. 7-8, 10.

Equally unsuccessful are respondents' efforts to explain away the conflict with *Marrese*. As we showed (Pet. 27-29), this Court's decision in *Marrese* turns on the bedrock res judicata principle that a previous proceeding cannot be used as a bar to claims that could not have been adjudicated there. See RESTATE-

MENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982). According to respondents, the Eleventh Circuit's opinion is faithful to that principle because it rests on the determination that all of petitioner's claims against the respondents *could have been raised* before the Korean bankruptcy proceeding. Suzuki Opp. 2-3, 27-28. In fact, the panel majority merely *assumed* (ignoring unrebutted expert evidence of Korean law to the contrary, see Pet. 7 n.3; CMA *Amicus* Br. 9-10) that all of petitioner's claims could have been raised in the Korean bankruptcy proceeding, based solely on the panel's view that those claims "arise out of the same nucleus of operative facts considered by the Korean court" and somehow "relate to" the "approval of the Modified Reorganization Plan and the MTA." Pet. App. 16a, 17a. That analysis reflects an abandonment – not an application – of the principle underlying *Marrese*. See Pet. 27-29; CMA *Amicus* Br. 8-10; *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("If 'relate to' were taken to extend to the fullest stretch of its indeterminacy, then for all practical purposes [ERISA] preemption would never run its course, for [r]eally, universally, relations stop nowhere[.]") (internal quotations omitted).[4] The Eleventh Circuit *never* found that all of petitioner's claims against respondents for damages for fraud and the like could have been adjudicated by the Korean reorganization court.

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[4] The GM respondents quibble (at 25) that *Marrese* "addressed the relationship of state and federal judgments in a federal system" under 28 U.S.C. § 1738, whereas this case involves a foreign judgment and its res judicata effect, under a treaty requiring Korean judgments to be treated the same as a "sister state judgment" (Pet. App. 15a), on state-law claims asserted in a federal court. Those distinctions in no way undermine the fundamental res judicata principle applied in *Marrese* – and ignored by the Eleventh Circuit in this case. Nor are the GM respondents correct in suggesting that *Marrese* has "nothing to do with comity." GM Opp. 26. See 470 U.S. at 380 ("Section 1738 embodies concerns of comity[.]").

Second, respondents argue that the Eleventh Circuit's novel expansion of the comity doctrine is consistent with various cases holding that "fraud and other tort claims attacking or arising out of a court-ordered asset transfer * * * are barred as improper attacks on the sale proceedings." GM Opp. 17-18 (citing, *e.g.*, *Gekas* v. *Pipin (In re Met-L-Wood Corp.)*, 861 F.2d 1012 (7th Cir. 1988)). But most of these cases – which the Eleventh Circuit neither cited nor relied on – are readily distinguishable because they involve suits by *a trustee or debtor* against a purchaser for alleged misconduct in connection with a court-approved bankruptcy sale – misconduct that allegedly affected the integrity of the bidding process itself and the ability of the estate to receive the best price possible. Unlike the claims of a non-debtor (such as petitioner) against other non-debtors (such as respondents), claims of this kind involve misconduct *in the bankruptcy sale process* that depresses the price received by the estate – conduct that falls squarely within the bankruptcy court's jurisdiction. These cases might preclude a suit by DWMC – the debtor that sold the assets – or its trustee against GM, but they have nothing to do with fraud claims by a party other than the debtor or the trustee against other third parties.[5]

Third, respondents attempt to defend the merits of the decision below. The GM respondents suggest that "all of [petitioner's] claims" are barred by virtue of the panel majority's conclusion that the Distribution Agreement does not give petitioner "'any rights in the vehicles manufactured by GMDAT and sold by Chevrolet and Suzuki.'" GM Opp. 26 (quoting Pet.

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[5] The few cases cited by GM that *do* involve suits by third parties against a purchaser of property of the estate, *e.g.*, *Regions Bank* v. *J.R. Oil Co., LLC*, 387 F.3d 721, 725, 728-32 (8th Cir. 2004), are also easily distinguishable because they involve (1) claims of a direct interest in the property transferred, and (2) court orders that expressly provide for sales that are "free and clear" of all encumbrances or claims – language that does not appear in the Korean reorganization court's order.

App. 13a). But that is doubly mistaken, because the panel did not rely on that rationale as the basis for its comity ruling (as opposed to its separate ruling regarding the automatic stay) and, in any event, as Judge Tjoflat correctly noted, "most of [petitioner's] claims *solely* concern the [respondents'] dealings with [petitioner], *separate and distinct from* the transfer of [DWMC's] manufacturing assets to GM and its partners." Pet. App. 19a (emphasis added). See Pet. 9-10, 26-27. Thus, petitioner sought damages on thirteen out of fourteen claims, and "[a]warding Daewoo America damages pursuant to its claims * * * would *do nothing to disturb* GM's ownership interest in GMDAT, nor would it affect GMDAT's continued control of the Daewoo Korea Plants and other assets." Pet. App. 27a n.8 (emphasis added). And petitioner's successor liability claim was "directed at GMDAT, not [DWMC]," and was if anything "simply seeking to *enforce* the bankruptcy court's order." *Id.* at 33a (emphasis added). Had the panel majority applied something other than a highly deferential standard of review, it no doubt would have concluded – as did Judge Tjoflat – that most of petitioner's claims clearly were *not* barred by the doctrine of international comity.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] Unfortunately, space does not allow us to correct the many distortions of the record contained in respondents' briefs, including GM's positively Kafkaesque assertion (at 4) that petitioners really "benefited" from GM's fraud and from the MTA by "becoming U.S. warranty administrator" for the discontinued line of Daewoo-branded vehicles, or GM's false suggestion (at 23) that petitioner "could have obtained complete relief" by defeating the plan that the Korean reorganization court approved. By the time of the Korean court's approval, petitioner had already been crippled by respondents' fraudulent and tortious conduct. See Pet. 2-5.

Respectfully submitted.

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